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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STEPHEN ESCONDON MEDINA,

Plaintiff,

v.

R. HUESO,

Defendants.

Case No. 08 CV 0896 JLS (RBB)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS THE COMPLAINT**

Hearing: September 15, 2008
Time: 10:00 a.m.
Courtroom: B
Judge: The Honorable Ruben B.
Brooks

Plaintiff filed his original Complaint in this matter on May 20, 2008. (Doc. 1.) This Court ordered service of Plaintiff's Complaint on June 9, 2008. (Doc. 4.) Defendant R. Hueso submits the following Motion to Dismiss the First Amended Complaint on the ground that Plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act.

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SUMMARY OF PLAINTIFF'S ALLEGATIONS

Plaintiff alleges that on July 18, 2007, he was transported to Alvarado Hospital Medical Center from Calipatria State Prison by Defendants Castone^{1/} and Hueso. (Compl. ¶ 1.) Plaintiff avers California Department of Corrections and Rehabilitation procedures require Plaintiff to wear waist chains and leg restraints during the transfer. (*Id.*) Plaintiff alleges he specifically asked Defendants to fasten his seatbelt, but was ignored by Defendants. (*Id.* at ¶ 2.) Plaintiff claims he could not fasten the seatbelt himself due to the nature of his restraints. (*Id.*) Defendant Hueso drove from Calipatria to Alvarado Hospital without incident. (*Id.*)

While Plaintiff was visiting with his doctor at Alvarado Hospital, he observed Defendant Castone appearing to be exhausted by closing his eyes and "teetering back and forth, while standing." (*Id.* at ¶ 3.) Plaintiff claims Defendant Hueso also observed Defendant Castone's conduct. (*Id.*)

After Plaintiff's appointment, he claims he was taken back to the vehicle where he again requested to be fastened into a seatbelt; however, Defendants again ignored his request. (*Id.* at ¶ 4.) The driver, Defendant Castone, upon pulling out tapped another car. (*Id.*) During the drive back to Calipatria, several cars honked their horns at Defendant Castone because he crossed over into the next lane and almost hit a car. (*Id.* at ¶ 5.) Plaintiff told Defendant Castone to let Defendant Hueso drive and again requested a seatbelt. (*Id.*) Defendants again ignored Plaintiff's request for a seatbelt. (*Id.*)

Defendant Castone stopped at a gas station in order to get gas. (*Id.* at ¶ 6.) After filling up with gas, Defendant Castone proceeded to park the vehicle. (*Id.*) However, Defendant Castone had difficulties parking the vehicle, got frustrated, accelerated and rammed the vehicle into a concrete block. (*Id.*) The impact caused Plaintiff to fall out of his seat, head-first, into the back where Plaintiff hit his head on a bolt and was knocked unconscious. (*Id.*) Once Plaintiff regained consciousness, he found himself on the floor of the vehicle covered in blood. (*Id.*)

1. Defendant Castone has not been served in this matter. However, even if Plaintiff manages to serve Defendant Castone, he has not exhausted his administrative remedies as to any Defendant; therefore, it would be futile for this case to continue.

1 Defendants noticed Plaintiff on the floor, came to his assistance, placed a cloth on his head and
 2 drove him to the emergency room. (*Id.*)

3 Plaintiff was treated and released from the emergency room. (*Id.* at ¶ 7.) On the way
 4 back to Calipatria State Prison, Plaintiff was again left without a seatbelt. (*Id.*) Plaintiff suffered
 5 a scar and continues to suffer severe headaches. (*Id.* at 8.)

6 ARGUMENT

7 I. PLAINTIFF'S SHOULD BE DISMISSED BECAUSE HE 8 FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.

9 1. Applicable Legal Standard for an Unenumerated 12(b) Motion

10 The Ninth Circuit has held that the failure to exhaust nonjudicial remedies "should be
 11 treated as a matter in abatement subject to an unenumerated Rule 12(b) motion." *Wyatt v.*
 12 *Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). Authority for the "unenumerated" 12(b) motion
 13 derives from this Court's inherent power to regulate actions, including authorizing motions not
 14 explicitly recognized by the rules. *Ritza v. Int'l Longshoremen's and Warehousemen's Union*,
 15 837 F.2d 365, 369 (9th Cir. 1988). "In deciding a motion to dismiss for failure to exhaust
 16 nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of
 17 fact." *Wyatt*, F.3d at 1119-1120. Because no presumption of truthfulness attaches to Plaintiff's
 18 allegations in such matters, the court may resolve any disputed material facts before proceeding
 19 further. *Ritza*, 837 F.2d at 368-69. If the court concludes that the prisoner has not exhausted
 20 nonjudicial remedies, the proper remedy is dismissal of the claim. *Wyatt*, 315 F.3d at 1120.

21 Under *Wyatt*, *Ritza*, and the other authorities cited above, in ruling on this motion, the
 22 Court may properly look to the declarations of D. Bells, Appeal's Coordinator at Calipatria State
 23 Prison, and T. Emigh, Chief of the Inmate Appeals Branch. The evidence supporting this motion
 24 demonstrates that Plaintiff did not file an appeal challenging Defendant Hueso's alleged actions.
 25 As such, Plaintiff did not exhaust the grievance process, and the Court should grant this motion
 26 to dismiss.

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1 **2. Plaintiff Failed to Exhaust His Administrative**
 2 **Remedies as Required by the Prison Litigation Reform Act.**

3 The plain language of 42 U.S.C. § 1997e(a) mandates exhaustion of administrative
 4 remedies *prior to* filing the complaint in federal court. *McKinney v. Carey*, 311 F.3d 1198, 1199
 5 (9th Cir. 2002) (emphasis added). The Prison Litigation Reform Act ("PLRA") amended
 6 42 U.S.C. § 1997e to require exhaustion of administrative remedies under all circumstances in
 7 § 1983 actions brought by prisoners:

8 No action shall be brought with respect to prison conditions under
 9 section 1983 of this title, or any other Federal law, by a prisoner
 10 confined in any jail, prison, or other correctional facility until such
 11 administrative remedies as are available are exhausted.

12 In *Booth v. Churner*, 532 U.S. 731 (2001), the Supreme Court held that this
 13 amendment "eliminated both the discretion to dispense with administrative exhaustion and the
 14 condition that the appeals process be 'plain, speedy and effective' before exhaustion could be
 15 required." Moreover, the *Booth* court held that Congress mandated exhaustion clearly enough,
 16 regardless of the relief offered through administrative procedures, even where the relief sought by
 17 a prisoner cannot be granted by the administrative process. *Id.* at 734. Thus, exhaustion of
 18 administrative remedies is a prerequisite to suit. *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

19 In a recent decision, the Supreme Court made clear that procedural rules, including
 20 deadlines for submitting prison administrative appeals, must be observed to properly exhaust the
 21 administrative process under the PLRA. *Woodford v. Ngo*, 128 S. Ct 2378, 2385 (U.S. 2006).
 22 The Court reasoned that "administrative law requires proper exhaustion of administrative
 23 remedies, which means using all steps that the agency holds out, and doing so properly, so that
 24 the agency addresses the issues on the merits." *Id.* Thus, exhaustion under the California
 25 Department of Correction and Rehabilitation's administrative appeals process "demands
 26 compliance with [its] deadlines and other critical procedural rules because no adjudicative
 27 system can function effectively without imposing some orderly structure on the course of its
 28 proceedings." *Id.* at 2386.

 The State of California provides its prisoners and parolees the right to administratively

1 appeal “any departmental decision, action, condition or policy perceived by those individuals as
 2 adversely affecting their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). To exhaust available
 3 administrative remedies, a prisoner must proceed through an initial informal level, and three
 4 formal levels of review, culminating in a Director’s Level Decision. *Id.* at § 3084.5; *Barry v.*
 5 *Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal.1997). A prisoner must submit his or her grievance
 6 within fifteen working days of the event complained of. Cal. Code Regs. tit. 15, § 3084.6(c).

7 The declarations of D. Bell and T. Emigh prove that Plaintiff failed to exhaust
 8 administrative remedies. (*See generally*, Decl. of T. Emigh, Decl. of D. Bell.) Specifically, D.
 9 Bell confirms that Plaintiff did in fact file an inmate appeal related to the claims in this lawsuit;
 10 however, he filed it nearly four months late. (Decl. of D. Bell ¶¶ 4-6, Exhibit A.) Therefore,
 11 Plaintiff’s inmate appeal was screened out as untimely. (*Id.* at ¶ 6.) Plaintiff claims, in his
 12 Complaint, that his appeal was exhausted at the Director’s level on February 5, 2008. (Compl. at
 13 p. 10.) However, the Declaration of T. Emigh, Director of the Inmate Appeal’s Branch, indicates
 14 that Plaintiff only exhausted one appeal at the third level. (Decl. of T. Emigh ¶ 7.) This appeal
 15 was exhausted in May of 2006 - prior to the date of the incident in the Complaint. (*Id.*)
 16 Therefore, Plaintiff has failed to exhaust administrative remedies. Furthermore, this lawsuit
 17 should be dismissed *with* prejudice because the time limits to appeal have expired. *See Janoe v.*
 18 *Garcia*, 2007 WL 1110914, at * 8-9 (S.D. Cal. March 29, 2007).

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CONCLUSION

In conclusion, Defendant Hueso respectfully requests this Court grant the motion to dismiss because Plaintiff failed to exhaust his administrative remedies. Moreover, Defendants request the dismissal be with prejudice due to Plaintiff's failure to timely file an inmate appeal.

Dated: July 31, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Medina, Stephen Escondon v. R. Hueso, et al.**

No.: **08CV0896 JLS RBB**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On August 12, 2008, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

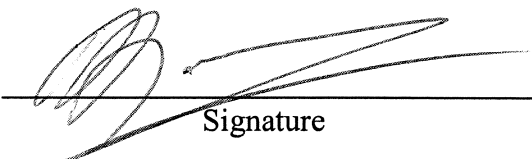
Stephen Escondon Medina
E-63667
Calipatria State Prison
P. O. Box 5005
7018 Blair Road
Calipatria, CA 92233-5005

In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 12, 2008, at San Diego, California.

D. Daswani

Declarant


Signature

70133316.wpd